# In the United States
# Circuit Court of Appeals
## For the Ninth Circuit

DAVE CULJAK,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*

No. 6469

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

# Brief of Appellant

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### STATEMENT OF THE CASE

Upon appeal from the United States District Court for the Western District of Washington, Southern Division, convicting appellant, with one other, of the crime of maintaining a liquor nuisance.

Except to say here that the conviction was based

upon a single alleged sale, appellant begs leave to refer the court to the heading herein, "Upon the Merits," for a more detailed statement of the facts.

## ARGUMENT

Appellant will present together his first and second assignments of error. The first involves a challenge to the sufficiency of the indictment, presented by way of a demurrer thereto; and the second presents the same question by way of a motion to quash, interposed in the court below.

The point presented by both is that the indictment contains a fatal misjoinder of parties defendant.

The prosecution was initiated by way of a single indictment. This indictment contained four counts as follows:

1. That defendant (appellant) Culjak sold certain intoxicating liquor, in the City of Aberdeen, State of Washington, on October 17, 1930.

2. That another defendant Forest W. Nicholson in the same city sold some other and different liquor on November 3,..... (year not stated).

3. That defendant (appellant) Culjak also in said city made a further sale on November 22, ..... (year not stated).

4. That defendants Culjak and Nicholson *together* conducted and maintained a nuisance for the sale of intoxicating liquor in said City of Aberdeen beginning October 17, 1930, and continuing to November 22, 1930.

To this indictment appellant interposed a demurrer (Record, page 7), which was overruled and exception saved (Record, page 9).

Appellant then moved to quash the indictment because of defect of parties defendant (Record, page 8), which motion was denied and exception saved (Record page 9).

At the opening of trial the government confessed an objection to the introduction of any evidence as to counts 2 and 3, because those counts, in failing to state any year in which the alleged offenses were committed, failed to bring such offenses within the statute of limitations.

This left counts 1 and 4 still before the court and jury, count 1 alleging a sale by appellant, and count 4 the maintaining of a nuisance by appellant and one Nicholson. There thus remained the same misjoinder of defendants, and appellant at the opening of trial renewed his challenge to the procedure, and saved ex-

ception to the court's denial thereof (Record, pages 16, 17 and 18).

The statute governing reads:

> "When there are several charges against any person for the same act or transgression, or for two or more acts or transgressions connected together, or for two or more acts or transgressions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated."

R. S. Sec. 1024 (Comp. Stat. 1690).

Let it be noted at the outset that this statute concerns itself with both joinder of *parties,* and with joinder of *causes.* It will be necessary to bear this distinction in mind as we examine the authorities, for different considerations pertain to and different principles govern the two classes.

This statute received its first consideration from the Supreme Court of the United States in the case of

*Pointer v. United States,* 151 U. S. 396, 38 L. Ed. 208.

In that case there was a *single defendant;* but he was charged in different counts of the same indictment with two different and distinct murders, and the

indictment was challenged on that ground. This presented a question of the joinder of *causes.* The Supreme Court held that the lower court is invested with a certain amount of discretion at the outset, having in mind always that a defendant shall not be embarrassed in his defense; and that, when it developed upon the trial, as it did in that case, that the two murders had been committed at one and the same time and place, and under such circumstances that the proof in respect of one necessarily threw light upon the other, no error had been committed in permitting the joinder, the court saying:

> "There was such close connection between the two felonies, in respect to time, place and occasion that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other."

So much for the joinder of *causes,* and the principles attending. Now let us consider the joinder of *parties.*

The next case bringing this statute before the Supreme Court for consideration involved an alleged misjoinder both of *parties* and of *causes,* but it was considered by that court with reference only to the misjoinder of parties, and went off on that point only, holding squarely that it is not permissible to join

counts against two or more defendants with a count against part of them, or offenses charged to have been committed by all at one time with another and distinct offense committed by part of them at a different time.

*McElroy v. United States,* 165 U. S. 76, 41 L. Ed. 355.

The facts of the *McElroy* case were these: Five defendants were indicted, charged with assault with intent to kill one Elizabeth Miller. In another indictment, the same five were charged with assault with intent to kill one Sherman Miller on the same day; and in a third indictment, for arson of a dwelling house two weeks later. In a fourt indictment *three* of these *five* defendants were charged with a second arson on a different day. The lower court, under the statute hereinbefore quoted, had ordered the four indictments consolidated for trial, over the objection and exception of all the defendants, and the result of the trial was conviction of all, and all appealed.

"The order of consolidation under this statute," said the Supreme Court, "put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met at the threshold with the inquiry whether counts against five defendants can be coupled with a

count against part of them, or offenses charged to have been committed by all at one time can be joined with another and distinct offense committed by part of them at a different time."

This reduced the question to one involving the joinder or misjoinder of *parties* only. The court held such a joinder is not permissible, saying, *inter alia*:

> "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried."

That plainly denotes the principle for which this appellant has at all times been contending, and still contends; namely, that without regard to the joinder or misjoinder of *causes,* and the rules relating thereto, there can never be a joinder of *parties,* either by consolidation of indictments, or by two or more counts in one indictment, unless the parties are always the same.

That the evil struck at in the *McElroy* case was the misjoinder of *parties*, we have the word of the Supreme Court itself, who later epitomized that case for us, and said:

> "The inquiry in that case was 'whether counts against five defendants could be coupled with a count against part of them, or offenses charged to have been committed by all at one time can be

joined with another and distinct offense committed by part of them at a different time.' It was held that the statute did not authorize that to be done. The Chief Justice, speaking for the court, said: 'It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that with which all are tried'."

*Williams v. United States,* 168 U. S. 382, 42 L. Ed. 509.

The *McElroy* case has been cited in the books in some manner or other some thirty-five times at least. All those cases have been examined by the writer, and few of them are of any assistance here. But such as are in point will be presented now. (Bearing in mind, always, that whether the question of joinder or misjoinder arises from the consolidation of two or more indictments, or from one indictment with two or more counts, makes no difference; *McElroy* case above; *Williams* case above.)

In *Gallaghan v. United States,* 229 Fed. 172, decided by the Circuit Court of Appeals for the Eighth Circuit, three informations had been consolidated for trial, without objection. All involved offenses against the National Prohibition Act. The court said:

"The information in No. 2227 charged Jackson

> and the two Colwells, in No. 2238 it charged Gallaghan and the two Colwells, and in No. 2248 it charged Shea and Stevens and the two Colwells. The six offenses as charged in the three informations could not have been joined in separate counts of one information. Therefore, there could be no consolidation under Section 1024 R. S. (Section 1690, Comp. St.). *McElroy v. United States,* 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355. There were parties defendant in each information, put upon trial, who were not defendants in either of the other two informations."

The court refused to reverse, however, because the consolidation had been effected without objection.

The Circuit Court of Appeals for the Fourth Circuit has also had this same question before it, and in a case involving violations of the National Prohibition Act.

*Zedd v. United States,* 11 Fed. (2nd) 96.

It was there held that it is not permissible to force two defendants to trial, over objection, with a third who was charged with two offenses of which neither of them was accused, the court saying:

> "As we read McElroy's case, that which was there condemned was the forcing a common trial of separately charged defendants."

In this *Zedd* case the government, in its brief, said that in adopting the procedure complained of it had been actuated by a desire to expedite business. What

the court said in reply is no doubt *obiter,* but interesting nevertheless.

In *DeLuca v. United States,* 299 Fed. 741, the Circuit Court of Appeals for the Second Circuit likewise had the same question before it, and its decision was as herein contended for. In that case one indictment against nine defendants charged a conspiracy to defraud the United States by a removal of opium from a bonded warehouse without payment of the duty thereon, and a second indictment against five defendants charged a sale of opium in violation of the Harrison Narcotics Act. Some of the defendants were included in both indictments, and some were not. These indictments, over objection and exception, were consolidated for trial, upon the theory that the court had a discretion in the matter. But the upper court held otherwise, saying at page 743, after quoting the statute:

> "Thus the statute permits the consolidation of indictments only when offenses might have been joined originally in separate counts. The effect of a consolidation of indictments is to render the consolidated indictments as one bill with as many counts as there are accusations. *McElroy v. United States,* 164 U. S. 76, 17 Sup. Ct. 31, 41 L. Ed. 355; *Porter v. United States,* 91 Fed. 494, 33 C.C.A. 652. The word 'count' is made use of in the indictment where, in one finding by the grand jury, the essential parts of two or more

separate indictments, for crimes apparently distinct, are combined. 1 Bishop's New Crim. Proc. Sec. 421. Where an accused is charged in a single bill with more than one count, it is the grand jury that consolidates the indictments; but if separate bills are found, the court can do no more than was the privilege of the grand jury, for it has no greater power to consolidate. In the instant case the conspiracy indictment was against the plaintiffs in error and seven others. The indictment founded on the Harrison Act was against the plaintiffs in error and three others. Each indictment was against a definite group. Although it appears that certain of the defendants were members of both groups, others were not, and therefore the groups were distinct. The statute refers to several charges, which shall be against the same person, and when the charges are against more than one person, there can be no consolidation by the court, unless all the defendants are identical in all the indictments. In the *McElroy* case, *supra,* a similar question was presented, and it was held that where several charges were made in four indictments, not against the same persons, and which were consolidated, the conviction after such consolidation could not be sustained."

We come now to a case that causes us some apprehension, a case later than all the others hereinbefore cited, and one that was decided by this court—the case of

*Morris v. United States,* 12 Fed. (2nd) 727.

We reprint the statement of facts in that case, just

as it is given in the court's decision:

> "There were six indictments against the plaintiffs in error, each containing two counts. In the first indictment the first count charged them with jointly making a false partnership income tax return for the year 1921. The second count charged Morris with perjury in falsely swearing to that return. In the second indictment they were charged in the first count with having made a false return of partnership income for the year 1920. The second count charged Jones with perjury in falsely swearing thereto. In the third indictment Morris was charged with having made a false return of his income for the year 1920, and the second count charged him with falsely swearing thereto. In the fourth indictment Jones was charged with having made a false return of his taxable income for the year 1920, and in the second count he was charged with perjury in falsely swearing thereto. In the fifth indictment Jones was charged with having made a false income return for the year 1921, and the second count charged him with perjury in swearing thereto. In the sixth indictment Morris was charged with having made a false return of his taxable income for 1921, and the second count charged him with perjury in having sworn thereto. The indictments were consolidated for trial. Verdicts of guilty were rendered upon all the counts charging the making of false income returns, but there was acquittal upon all of the counts charging perjury."

And because of this court's affirmation of the judgment appealed from, and comments we find it necessary to make thereon, we reprint, too, so much of the

court's opinion as bears upon the point in issue herein, the italics used being our own and adopted as a helpful way of indicating the matter to be commented upon.

> "Against each of the first two indictments demurrers and motions to quash were interposed on the ground of misjoinder *of causes and of parties,* in that in the first count in each both defendants were charged with making a false return of income, while in the second count in each but one defendant was charged with perjury in making a false affidavit to the return. Clearly there was no abuse of discretion in the court's ruling. The joinder of the charges *of making false returns* was permissible under section 1024, Revised Statutes (Comp. St. Sec. 1690), *for they embrace two or more acts or transactions connected together and of the same class of crimes.* The plaintiffs in error rely on *McElroy v. United States,* 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355, where six individual defendants were indicted and charged with assault with intent to kill on April 16 and an assault with intent to kill another person on the same day ,arson of the dwelling house of another on May 1, and three of the defendants were charged with arson of the dwelling house of still another on April 16. The court held that such a joinder cannot be sustained where the parties are not the same, *and where the offenses are in no wise parts of the same transaction and not provable by the same evidence.* But such is not the case here. The defendants were charged in each indictment with making false partnership income returns and one of them was charged with making false affidavit thereto.

> These charges *grew out of the same transactions.* The *falseness of the returns and the falseness of the affidavits* were provable by the same evidence, and both defendants might properly have been charged with complicity in the perjury. But in any event the joinder of counts *for perjury with counts for making false returns* is no ground for reversal in a case where, as here, the jury acquitted the defendants on all the perjury counts. *Commonwealth v. Adams,* 127 Mass. 15; *Ketchingman v. State,* 6 Wis. 426; *State v. Morris,* 58 Or. 397, 114 P. 476; *State v. Solon,* 247 Mo. 672, 153 S. W. 1023; *Myers v. State,* 92 Ind. 390; *Reed v. State,* 147 Ind. 41, 46 N. E. 135."

As we read the decisions of the Supreme Court and of the other Circuit Courts of Appeals, hereinbefore cited, this decision seems to us to be out of line therewith. But if analyzed correctly it may be our misgivings will prove unfounded.

In the first place, what was the question before the court? It may be we have not the correct answer in mind.

The statement of facts indicates that the legal mind might well have raised the question both of misjoinder of *parties,* and misjoinder of *causes,* though if the authorities had been closely scrutinized beforehand the latter would have been found untenable. It appears from such statement, however, that by demurrer and motion to strike counsel *did* raise both

points. Again, as Judge Gilbert began to write the court's opinion, it appears that both questions were before the court, for he says that the demurrer and motion to quash were interposed "on the ground of misjoinder of *causes* and of *parties.*" That makes two questions, as we have heretofore pointed out, each ruled by different considerations and different principles, as we have also heretofore shown.

But what became of the question of misjoinder of *parties?* So far as we can see, it was overlooked by the court and not passed upon. The whole trend of the court's thought seems to have been upon the sole question of misjoinder of *causes.* You say the joinder was permissible under Section 1024, "for they (the charges) embrace two or more acts or transactions connected together and of the same class of crimes." That is a consideration bearing upon the joinder of *causes*—but not of *parties.* Next, after saying that the plaintiffs in error rely upon the *McElroy* case, this court countered with some observations that pertain aptly enough to the question of joinder of *causes,* but not of *parties.* Then you end by citing some six authorities from as many different state cases to support the assertion that in any event the joinder of "counts for perjury with counts for making false returns," (joinder of *causes*

purely), is cured by acquittal upon one or the other. And an examination of these cases, too, shows each one to concern itself only with the joinder or misjoinder of *causes.*

So far as we can see, the question of misjoinder of *parties* was not passed upon, though squarely placed before the court.

Now, may we say, so far as the question of misjoinder of *causes* is concerned, the judgment of the court in the *Morris* case is sound, the facts of the case upon that point being ruled squarely by the Supreme Court in the *Pointer* case, supra.

But upon the other question, the misjoinder of *parties,* if squarely before the court, the judgment should have been reversed upon the authority of the *McElroy* case—if we and the other Circuit Courts hereinbefore cited read that case correctly. This qualifying clause, too, suggests an issue with this court —who does read it correctly? For, you say, in commenting upon the *McElroy* case, the Supreme Court "held that such a joinder cannot be sustained where the parties are not the same, *and where the offenses are in nowise parts of the same transaction and not provable by the same evidence.*" We respectfully urge that the latter clause is not a moving considera-

tion in the *McElroy* decision, that the sole evil struck at and meant to be corrected in that case was the *forcing to a common trial* a plurality of defendants when one or more of such defendants was not a party to the case of some other defendant — that *parties* must always be *identical* in all the counts or consolidated indictments tried together. (Note, too, again the *Williams* case, decided by that court, and hereinbefore cited.)

If we are right so far, further argument would seem superfluous. But the final clause of that portion of the *Morris* judgment hereinbefore set forth, wherein this court held that the error, if any, was cured by acquittal upon one or the other of the misjoined counts, leads us to dwell upon that point with reference to the present case, for in this case appellant was acquitted upon one of the two counts, and is now in this court upon appeal from a judgment of conviction upon one count only. Is the error thought now to be cured?

Having no quarrel to wage over the joinder or misjoinder of *causes,* for that question is not involved here, the decision in the *Morris* case, so far as it pertains to that point, is unquestioned. But if we are to be challenged with the proposition that ac-

quittal upon one of two counts can cure a misjoinder of *parties,* we unqualifiedly dissent, and ask to be heard.

If the evil struck at in the *McElroy* case is the massing together for a *common trial* a lot of defendants who have not common *interests,* because one or more of such defendants may be prejudiced in his trial by the mere presence of one or more of the other defendants, or the mere presentation of some other crime with which it is not contended he is connected, then obviously such evil cannot be cured by the event of the trial, for the damage has been done, and is incurable.

In such a case—misjoinder of *parties*—prejudice is presumed. That, we assert, is the holding of the Supreme Court in the *McElroy* case. How else do we interpret the words of that court: "Necessarily, where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error," read in connection with the context where those words are used?

Let it be noted, too, that the government, when before the Supreme Court in the *McElroy* case, attempted in just that manner to save a part of its

case. It confessed a reversal as to the *two* defendants *not common* to all the counts, andasked for affirmance as to the others, contending that the latter could not have been prejudiced by the common trial. The court refused to hold that the error could be so cured, saying:

> "It cannot be said in such cases that *all* (italics ours) the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

When parties defendant have been misjoined and tried together, *prejudice is presumed.* That is appellant's situation, and for that reason the judgment appealed from should be reversed.

## UPON THE MERITS
## ASSIGNMENTS OF ERROR III, IV, V, VI, VIII AND XI.

What has gone before, it seems to us, is decisive of this case. Yet it may be deemed to be a "technicality"—a something subtile, that too oft is employed to avoid discussion upon the merits, and hence fail to win for the one employing it a warm sympathy from those to whom it is addressed; while appellant would have the court feel, with him, that he has real

merit in his case upon the facts. True he has "possessed" liquor twice before, and has been convicted therefor. But that he has since "maintained a nuisance" is not true, and we sincerely urge that the evidence offered falls far short of proving the contrary.

The "Aberdeen Cigar Store," at 316 South "G" Street, in the City of Aberdeen, Washington, is what its name implies, a cigar store. In addition thereto, a lunch counter was being added at the time the arrests herein were made.

No evidence was offered by the government concerning the place; no evidence as to who "maintained" it — whatever the word "maintain" may mean—no evidence of who the owner was, or who the operators or employees were. No liquor was ever found upon the place. No evidence of suspicious circumstances about the store was offered, of people going in and out, of intoxication, of ill repute. So far as the government's case is concerned, the record is absolutely silent upon the nuisance charge, except that this cigar store was named as the spot where were made three alleged sales of liquor, disputed by the defendants, and to be discussed under this heading. The government approached the trial apparently with a notion that a conviction upon a sales count

would of itself carry conviction upon the nuisance count, and rested its case on this theory.

But from the evidence of defendants themselves these facts pertaining to the place are shown: That the cigar store was owned by the defendant Nicholson, and that appellant Culjak was his employee. Nicholson had purchased the same for $450.00 and had added a $350.00 stock, making a total investment of $800.00. The store was purchased and opened up October 20, about five weeks before the arrests were made, December 1st. Cigars were the stock in trade, but a lunch counter was being installed when work was interrupted by the arrest.

And from the record as a whole, too, these facts appear: That for several weeks prior to December 1, 1930, the prohibition forces had been extremely active in and about Aberdeen, and on that date a swarm of these forces rounded up some fifty to ninety persons to be charged with various liquor offenses. Much irregularity was involved—but not stressed here—due to the fact that the warrant of arrest for a particular person would be in the hands of one officer, while some other officer would happen to "spot" someone deemed to be wanted, and would then and there make the arrest on the authority of his badge.

Appellant Culjak was thus picked up. He was not arrested at his place of business, nor upon a warrant. A few minutes before his arrest he had been relieved from his work for an hour by his employer, Nicholson, that he might get his lunch, and had gone to the "Midway Cigar Store," a block distant, for that purpose, when a prohibition agent named Dewey Harrison entered the "Midway" for the purpose of arresting one Victor Danich therein, and seeing Culjak arrested him also, saying to him, "Come on, Dave. The marshal has got a warrant for you." (Record, page 25.) This agent testified later that, "We arrested so many that day I just recall I picked him out and picked him up." (Record, page 26.) Culjak was then hustled before the United States Commissioner, where were some eighty or ninety others in the room in the same predicament as he, and bound over to the grand jury.

But as to why he was thus picked up, and thus bound over, appellant had to wait the trial to learn, and we now take up the evidence pertaining to three alleged sales:

Dewey Harrison, the arresting officer, testified: That on October 17, he and one Erickson went to the Aberdeen Cigar Store where Culjak was employed,

and that Culjak asked them if they wanted something. Being told they did, Culjak went by a circuitous route out of their sight into another room and admitted them through another door. There he served a couple of rounds of drinks from a bottle held in his hand, for which the agents paid him in cash. (Record pp. 18 and 19.)

This was the sales charge laid in Count I. Appellant denied the allegations, and from the testimony of both defendants, and from other witnesses, it was shown that the cigar store had not been opened up for business by Nicholson until two or three days after this alleged occurrence, and that appellant's employment therein had not begun until two days later still. These facts being placed before the jury, they acquitted upon the sales charge, Count one.

Harrison testified that he relied upon his notes for the date, and upon his memory for the rest of his "facts." (Record p. 22) Both his notes and his memory being thus discredited by the verdict of the jury, surely the evidence given by this witness as to that particular transaction cannot now be employed to substantiate the nuisance charge contained in count four.

Next, count two, pertains to a sales charge against *Nicholson.* This count was stricken by the court, with

the consent of the government, but the evidence pertaining thereto was received nevertheless because of its bearing upon count four, the nuisance charge. It is not necessary to treat of it here in detail, because it was shown and not disputed that upon the date involved appellant was in Portland, (Record page 35); and in the absence of any showing of agency the facts of sale, by another, if true, could not involve appellant in any manner.

Now,as to count three, and the facts pertaining thereto. This count had also been suppressed, but the evidence received for its bearing upon count four.

The same Dewey Harrison testified that on November 22nd he again visited the cigar store, accompanied by the said Erickson, and also by another prohibition agent named Robinson. That Culjak and Nicholson were present. That the agents asked for liquor, and that Culjak went aound into the same room as before testified to and admitted them through another door. That he had a bottle of moonshine in his hand, from which he served a round of drinks, and was paid for it. That witness then asked for a small bottle of the same, and that Culjak left the room, coming back with a half-pint for which he was paid and received $1.00. (Record pp. 19, 20, 21.)

In support of Harrison, Agent Robinson was sworn, and testified as to the transactions both of November 23rd, and of November 3rd, relating to the alleged sale by Nicholson, detailing the facts of both occasions as Harrison had, but on cross-examination said, "that there was a possibility that he could have been mistaken about this transaction, in the confusion and accumulation and multitude of transactions that he had there." (Record, page 30.)

Mr. Erickson, who was said to have been present and to have witnessed all these transactions, was not placed upon the stand.

So that, to support the conviction of appellant of the crime of maintaining a nuisance, we have the evidence of a single sale; this evidence being given by a witness (Harrison) who, when his testimony is given under a sales count, and the issue thus finally drawn, is repudiated by the jury; and this discredited witness then "corroborated" by another witness (Robinson), who frankly admits on cross-examination that he may have been mistaken.

So much upon the merits. The facts thus related are not set forth *apropos* any particular assignment of error, but will be employed as we discuss the next assignment.

## MOTION FOR DIRECTED VERDICT AS TO COUNT FOUR — ASSIGNMENT OF ERROR VII

At the close of the government's case, appellant moved the court for a directed verdict upon count four, the nuisance count, for lack of evidence, which motion was denied and exception saved. (Record, pages 32 to 34.)

This motion was renewed at the close of all the evidence, and again denied and again exception saved. (Record, page 44.)

A nuisance under the Volstead Act is "any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept, or bartered;" and "any person who maintains such a nuisance" shall be punished, etc.

That is to say, a nuisance is a *place, where.* And one, to be guilty of maintaining a nuisance, is one who *maintains* such a *place, where.*

Now, the government in its evidence, confined itself to talk about a *sale,* solely. As if conviction of making a sale would of itself carry conviction of maintaining a nuisance. Sometimes it does, perhaps; that is to say, in presenting the evidence about a sale, or sales, the facts and circumstaces pertaining thereto may at times be so elaborated as to show the main-

tenance of a nuisance. But such is not always the case, and it is not the case here.

If the evidence of the government is to be believed—and the jury refused to believe it when addressed directly to a sales charge—it fell short in failing to show the *place where,* and who *maintained* it. Rather, it showed affirmatively that the *place where* was *not* the place where *charged,* for the evidence was this: That upon being asked for liquor the appellant disappeared, and then re-appeared in another room with liquor in a bottle *held in his hand;* and that when asked again, in this room, for a half-pint, he again disappeared, and again re-appeared with a half-pint bottle in his hand; showing clearly that the liquor, if "kept" at all, was "kept" some place other than at the place charged.

True, the "sale" was made, if made at all, at the place charged. But again the government fell short in its case, because it failed to show that the defendant "maintained" the place.

If this were an action *in rem* to abate a nuisance, and a sufficient number of such occurrences could be shown to asperse the character of the place, it might indeed be padlocked, without the law caring much about who the sufferer in purse was. But be-

ing an action *in personam*, against a person charged with crime, the law *is* particular that the government show who the person is who "maintained" the place, or rather, that the person charged was indeed the one who maintained it.

But the government was silent on the question. It talked about a "sale"—and stopped. And when the government thus rested, the nuisance charge should have been taken from the jury as requested by appellant.

It was only when the defendants were put upon their defense that we came to know anything at all about the place, and who "maintained" it, but this evidence added nothing to the government's case. The place is a cigar store; defendant Nicholson owned it, and appellant was his employee. This was not denied in rebuttal, and must be taken as true, so that to add to the government's case the fact that appellant was an employee in a cigar store, adds nothing to show that he "maintained a nuisance"—that he *"maintained"* a *place where* liquor was sold or kept for sale. And the motion to take the nuisance count from the jury, when renewed at the close of all the evidence, should have been granted.

## ASSIGNMENT OF ERROR NO. IX

"The court erred in giving the following instruction:

> 'The allegations of the first count touching the date, the 17th of October—now, if a criminal transaction, or the criminal act which the defendant Culjac is there tried, if you are convinced of every material allegation of that being true—convinced by the evidence beyond a reasonable doubt, save and except as to whether it occurred on the 17th of October or not, but you are convinced beyond a reasonable doubt that it occurred about that time, it is your duty to convict, although you may question its having occurred on the 17th of October. But, if the prosecution's witnesses have been mistaken about that, that is something that you can take into account in weighing the evidence and measuring the credit to be given their testimony. Where one is shown to be mistaken, why, the less credit you may reasonably attach to other portions of his testimony, in which there may not have been express evidence he was mistaken'." (Record, page 46.)

We earnestly contend that in view of the record in this case that the instruction was not only erroneous but prejudicial, notwithstanding the verdict of the jury of not guilty on this count. The government's witnesses testified to the sale on October 17th. The testimony of the defendant (Record, page 34), establishes that he did not commence work there until the 21st day of October, 1930, and the testimony of the

co-defendant Nicholson (Record, page 39), is that the place was not opened until October 19th and that the defendant Culjak went to work on the 21st. The testimony of witness Franich (Record, page 41), establishes that he worked there the 16th, 17th and 18th of October and that he was so employed and the place was not opened for business on October 17th. This testimony is also supported by the witness Fuller (Record, pages 42, 43). In other words, the effect of the defendant's testimony was not only to offer an alibi as to the date but also to establish by credible witnesses the fact that the officer was mistaken and that the transaction could not have happened, and the instruction of the court that the date was immaterial was not only prejudicial as to that count but also as to count 4 and is so apparent from the entire record that it needs no further argument (Record, page 50).

ASSIGNMENT OF ERROR NO. X.

"The court erred in giving the following instruction:

'The period of time that they are accused of maintaining this common nuisance is not a material allegation in the sense that it has to be shown that it covered all of that time. If they sold or kept intoxicating liquor of the description given in this fourth count of the indictment,

at that place, they would be guilty, even though it was for a shorter period of time than that stated. The Court has instructed you in numerous other cases concerning a nuisance. This law provides that any room, building or place where intoxicating liquor of the character here described, is sold or kept, is a common nuisance, and any person who maintains such a nuisance, is guilty of a misdemeanor. The words there used are to be understood by you in their common, ordinary meaning'." (Record, page 47.)

It will be noted in the Record, pages 50 and 51, that an exception was taken to this instruction and there the court again attempted to modify and change the instruction as shown in the record at page 51, as follows:

"MR. GARVIN: I know I haven't got it in your language, because I took it down in longhand, and didn't get the court's exact words.

THE COURT: The instruction was in effect, that the prosecution was not under the burden of establishing that it continued to be a common nuisance throughout the entire period alleged; that was the essense of it. Anything further?

MR. GARVIN: I still want an exception, even so.

THE COURT: Exception allowed."

It is the appellant's contention that the language used by the court in instructing the jury was not a correct statement of the law nor did it embody the elements of the crime charged as set forth in the

statute. The substance of the instruction taken from its most favorable view point is synonymous with an instruction for the possession or sale of intoxicating liquor and that there are additional elements imposed in this statute, clearly making it a separate and distinct crime, has been decided by the courts a great many times.

The evil of the instruction, we think, can be best exemplified by quoting the instruction given by Judge Sawtelle, sitting in the Western District of Washington, in the case of *Brownlow v. United States,* 8 Fed. (2d) 711-712, in which the instruction there given by Judge Sawtelle was approved by the Circuit Court of Appeals and is as follows:

> "In order to convict her, though, under that count in the indictment, it would be necessary for you to find beyond a reasonable doubt that she herself maintained and had charge of, control or ownership of that place and that she sold or kept for sale or had others sell for her, intoxicating liquor. Or that there were owners who owned the place at the time or had the exclusive right to possession thereof and that she aided or assisted such person or persons in maintaining or carrying on that house."

For the errors committed and shown herein, the judgment of the trial court should be reversed.

Respectfully submitted,

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